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No. 83-1015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ETC., *et al.*,
Appellants,

v.

HAMPTON COUNTY ELECTION COMMISSION, ETC., *et al.*,
Appellees.

On Appeal from the United States District Court for the District of South Carolina

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SUPPLEMENTAL BRIEF OF THE APPELLANTS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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I

Appellants concur in the suggestion of the United States that, while the decision below is inconsistent with the opinions of this Court and must therefore be reversed, the issues are neither so novel nor so complex as to require plenary consideration by this Court. The Department of Justice, which has administrative responsibility for enforcing section 5, particularly challenges the district court's holdings that (1) setting an election date

and a candidate qualifying period are not voting changes covered by section 5, and (2) that the Attorney General's preclearance of a new law carries with it "advance preclearance of future unspecified changes" that may occur in the implementation of that law. Brief for the United States, p. 13. The United States persuasively demonstrates that these holdings are wrong and should be summarily reversed.

The errors of the district court have been underlined by this Court's recent decision in *McCain v. Lybrand*, —— U.S. —— (Feb. 21, 1984). In that case this court reiterated the longstanding holdings that *all* voting changes must be submitted under the Voting Rights Act, and that voting changes can not be precleared unless they were explicitly submitted to and evaluated by the Attorney General. In light of the *McCain* decision the judgment of the district court in this case can be reversed without extended discussion. Summary reversal this Term is necessary if the possibility of a new election in 1984 is to be left open.

II

This Court need not consider nor address the issue of what action the district court should take if on remand the defendants in fact request preclearance of the voting changes which have occurred, and if such preclearance is granted. Whether such submission and preclearance will occur is at this point a matter of conjecture. Should both occur, the appropriate remedy will depend on the particular circumstances of the case. Under the rule of *Perkins v. Matthews*, 400 U.S. 379 (1971), in certain circumstances a premature election should be set aside even if it is precleared after the fact, while in other circumstances it should not. This issue should be addressed in the first instance by the district court in light of a factual record which does not now exist.

Therefore, appellants suggests that this Court, if it reverses the judgment below, should simply direct the lower court on remand to order appropriate relief in accordance with normal principles of equity.

The United States, however, appears to suggest, p. 16 n.11, that this Court should specify in its order of reversal that if on remand the Hampton County changes are submitted and precleared there should be no new election.[1] In the appellants' view, including such a provision in this Court's order at this stage would be not only unnecessary but would conflict in several major respects with this Court's decision in *Perkins v. Matthews, supra.*

If the United States simply means that the circumstances in this case (which it does not specify) warrant such relief, then, according to *Perkins* and traditional practice, that issue and those circumstances should first be considered by the district court. 400 U.S. at 397. Appellants believe that the 1983 election should be set aside even if the changes are now precleared. There are a number of factors in this case which strongly militate in favor of a new election, such as those described below at

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[1] The United States' suggestion of the conditional order appears to be based upon its view that the Attorney General can grant "retroactive preclearance" decision, Brief for the United States as Amicus Curiae, p. 11 n.6, which pre-empts the equity court's decision on relief. Whatever the merits of that view, it is not one which need be or should be considered by this Court now, when there has been no submission or preclearance. It is worth noting, in any event, that the Attorney General's decision, under the statute, is far different from the question faced by an equity court. He is to decide whether a change is racially discriminatory in purpose or effect. The equity court, on the other hand, having found a violation, must decide what remedy is adequate to redress the violation. Such remedy questions, unless amounting to racial discrimination, are not part of the Attorney General's charter under the Voting Rights Act, so that making relief depend upon the preclearance determination leaves *both* the Attorney General and the equity court without jurisdiction to order retroactive relief for an illegal election.

p. 6 and nn. 4 & 5, and we are entitled to be heard on this issue, just as the appellees should be heard if they argue that a new election should not be held.

If the United States' suggestion is read to mean that, as a general matter, the Attorney General's subsequent decision to preclear a change should preclude a district court from ordering a new election as a remedy for illegal implementation of the change (*i.e.*, implementation of the change before preclearance), there is even more reason for this Court not to accept the suggestion because it would raise serious issues affecting the Voting Rights Act. Such a standard would effectively overrule the *Perkins* holding which requires a number of factors to be taken into account. It would also violate the language and intent of the Voting Rights Act and would be inconsistent with longstanding principles of equitable relief.

1. In *Perkins*, when this Court considered what remedy should follow the holding of an election in which unprecleared changes were enforced, its first consideration was Congress' strong interest in achieving compliance with the Act's preclearance requirement. 400 U.S. at 396. The Court left the fashioning of the remedy to the district court on remand, while listing some other types of factors to be considered *along with* Congress' strong desire to achieve compliance, "such as the nature of the changes complained of, and whether it was reasonably clear at the time of the election that the changes were covered by § 5." Id. at 396. The option of ordering a new election only if the change at issue did not receive preclearance was cited as an example of relief that might be appropriate "in certain circumstances." *Ibid.* Making such an option the general rule would radically alter the remedial scheme of *Perkins*.[2]

[2] Significantly, on remand, even though all the changes involved in *Perkins* were precleared, the district court still ordered new elections for two of the four City Council seats that had been filled in the illegal election. *Perkins* v. *Matthews*, 336 F. Supp. 6 (S.D. Miss. 1971). See also Perkins v. Matthews, supra, Supplemental Judgment (S.D. Miss. June 19, 1972) (copy lodged with the clerk).

In Berry v. Doles, 438 U.S. 190 (1978) (per curiam), it was held that the circumstances of the particular case warranted use of the option referred to in *Perkins*.

2. This Court's emphasis in *Perkins* on compliance with the preclearance requirement was solidly based on the language and intent of Congress. Section 5 of the Voting Rights Act provides that no voting change can be implemented "unless and until" preclearance is obtained. The Act is violated not only substantively—by changes determined to be discriminatory—but also procedurally—by enforcement of any changes (discriminatory or not) which have not been precleared. As the years have passed since *Perkins*, compliance with the procedural requirement of preclearance has remained a serious problem, and the record of widespread non-compliance was one of the principle reasons for extending the Act again in 1982. In fact, Congress regarded enforcement of unprecleared changes as such serious violations (regardless whether the change so enforced was eventually precleared or not) that it made any instance of such illegal enforcement a bar to bailout. Section 4(a)(1)(D), 42 U.S.C. § 1973b (a)(1)(D).

A conditional order making the holding of a new election turn on whether a change implemented without preclearance is later determined to be discriminatory would essentially read the "procedural" requirement of preclearance out of the Voting Rights Act, by denying any relief for a violation of this requirement unless it were coupled with a violation of the "substantive" standards of the Act. Such a reading is fundamentally inconsistent with the Act, especially as Congress has strengthened it in 1982.

3. In fashioning relief for violations of federal law, the courts are to act in accordance with the broad, his-

toric equity power to grant full and effective relief. As this Court recently held in an analogous situation, full relief "should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination . . ." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).[3] A district court fashioning a remedy for a section 5 violation can of course properly consider the fact that the disputed voting change is subsequently precleared, but only as one of several factors. In this case, for example, the district court could consider not only that Hampton County officials knew at all times that preclearance was required, but also the fact that the violation materially affected the results to the prejudice of black voters, since several black candidates were barred from qualifying to run in the election.[4] Factors like these are traditional considerations for a court deciding what relief to grant,

[3] See also Louisiana v. United States, 380 U.S. 145 (1966), and other cases collected in Albemarle Paper Co., supra, at 415-22.

[4] See affidavit of Benjamin Brooks, March 10, 1983, filed in the district court on May 12, 1983, with the appellants' Motion for Temporary Restraining Order and Preliminary Injunction.

The unfairness of the election was recognized at the hearing on the motion for a temporary restraining order:

> "Q. BY THE COURT. Well, as Chairman of the Hampton County Board of Education, is it your position that you feel, under all the circumstances that exist, that this election should go forward tomorrow?
>
> "A. Judge, I don't know how to answer that, sir. I feel in view of the information that was furnished to me by the [South Carolina] Attorney General's office, that perhaps it should. From a realistic standpoint, sir, I can't tell you that I do agree with that, sir, from one standpoint. I don't know that I don't think it would be more fair to open up filing for this thing. But I am bound by the governing bodies of my state. I am appointed by the state. I have got to listen to what the Attorney General of my state tells me to do, sir. And that is what I have done." [Transcript, May 14, 1983, pp. 49-50.]

and there is no reason why relief under the Voting Rights Act should be more limited.[5]

Thirteen years after *Perkins*, and in the wake of a brand-new congressional determination that the problem of non-submissions is still intolerable, the standards for allowing illegal elections to stand should be more stringent, not less so. Voluntary compliance depends upon the threat of enforcement as a penalty for non-compliance. If there is no threat that an illegal election will be set aside, there is *no* incentive on a jurisdiction to comply, because the jurisdiction knows that it will *never* be worse off for violating the law than for obeying it.

Appellants do not ask this Court to order a new election as a remedy for the violation in this case. We simply ask that this Court refrain from precluding it, and

[5] The single district judge, in declining a TRO to halt the election, acted on the assumption that the election would later be set aside:

> "But I do feel that by my refusing to issue the temporary restraining order, I'm doing it because I think it comes awfully late in the game, and I also do not see where there is any irreparable harm or damage to the plaintiffs, or any person that they would purport to represent who would want to run because, if the Courts eventually decide that the proceedings conducted, the election conducted by the county are proper and legal, then there is no harm done. If the Court should ultimately decide to the contrary, then of course, this election will be thrown out and the plaintiff's rights would be protected and they would have the right to run in a future election that could be held." [Transcript, May 14, 1983, pp. 54-55.]

allow that remedy to be open to the district court in accordance with normal principles of equity.

Respectfully submitted,

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